



Suggested Amendments to the South African Electronic Communications Act: Interconnection and Facilities Leasing

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The Electronic Communications Act (EC Act) came into force in 2006. In the few years of its existence it has become apparent that the legislation does not allow for the effective regulation of the industry by, inter alia, the Independent Communications Authority of South Africa (Icasa). This is the second in a series of articles suggesting amendments to the EC Act. In this article, we discuss amendments to the provisions of the EC Act relating to interconnection and facilities leasing.

INTERCONNECTION AND FACILITIES LEASING IN THE EC ACT

Interconnection and facilities leasing involve the linking of two or more electronic communications networks or services. The purpose is to allow the customers of one network or service provider to have access to the customers or services of another network or service provider.

In South Africa, interconnection and facilities leasing are dealt with separately yet similarly in the EC Act. The EC Act sets out the principle of open access. It leaves most of the process to be regulated by Icasa.

Open Access Principle

Obligation to Interconnect and Lease Facilities

Section 37(1) of the EC Act provides that every licensee must interconnect on request, on terms negotiated, unless the request is unreasonable. Section 43(1) provides that every ECNS licensee must provide facilities on request, on terms negotiated, unless the request is unreasonable.

Exemption from the Obligation to Interconnect and Lease Facilities

Icasa may exempt licensees from the obligation to interconnect and ECNS licensees from the obligation to provide facilities, but only if Icasa has not found such licensees to have 'significant market power' in the relevant market.

Icasa may exempt ECNS licensees even if they have significant market power from the obligation to lease fibre loops and sub-loops serving residential premises if constructed after the coming into force of the EC Act.

Icasa has not yet exempted any licensee from the obligation to interconnect and lease facilities.

Essential Facilities

Section 43(8) of the EC Act provides that Icasa must prescribe a list of essential facilities, which must be provided in terms of section 43(1).

It is unlikely that a request for an essential facility could be challenged on the ground that the request is unreasonable, although this is not patently clear from the wording of the EC Act. Further, if a facility is listed as essential, it will likely attract heightened regulatory scrutiny by Icasa. This issue however needs to be clarified by Icasa in regulations that have yet to be made.

The Minister issued a policy direction to Icasa by Government Notice No 876 to the effect that Icasa should consider prioritizing and urgently prescribing a list of essential facilities to include facilities connected to the SAT-3/WASC/SAFE marine cable.

In Government Notice 1800 of 2007, published in Government Gazette 30610 of 24 December 2007, Icasa published a draft list of essential facilities and regulations pertaining thereto. Icasa proposes to declare as essential facilities a list of electronic communications facilities including co-location space, land-based fibre optic cables, backhaul circuits, cable landing stations, earth station, main distribution frame, and international gateways. No regulations, however, have actually been made by Icasa.

International Facilities

Sections 43(10) and (11) of the EC Act provide that an ECNS licensee may not enter into agreements for access to or use of international facilities, which agreements contain

exclusivity provisions, provisions that create undue barriers for accessing or using such facilities, or otherwise restricts any party from leasing, selling, or otherwise providing such facilities to other services providers.

Any existing contractual provision indicating as much will become invalid from a date set by the Minister of Communications. In a draft policy, the Minister indicated that the date would be 1 November 2007, however when the Minister issued the final policy directions in Government Notice No 876, there was no mention of this policy decision.

Ironically, although there is soon to be a competitor to the SAT-3/WASC/SAFE marine cable, ie, the Seacom cable, most of the incumbent licensees have not purchased capacity on the Seacom cable, preferring to pay higher rates for use of the SAT-3/WASC/SAFE cable (and passing those costs on to consumers, of course) for the time it takes for the roll-out of those marine cables in which the licensees themselves have financial interests.

Regulations

Icasa must in terms of the EC Act prescribe regulations to facilitate the conclusion of interconnection and facilities leasing agreements by stipulating agreement principles, with regard to, for example:

- Quality, performance and levels of service;
- Pricing;
- Points of interconnection;
- Disclosure of technical and planning information;
- Co-location;
- Access and security arrangements; and
- Unbundling.

Icasa must also provide by regulation, a framework for concluding interconnection and facilities leasing agreements, which might include:

- Reference offers, which are standard terms and conditions for interconnection or facilities leasing offered by a licensee;
- Time frames for negotiations, the conclusion and implementation of agreements;
- The framework for determining technical and financial feasibility and the promotion of efficient use of networks and services (the reasonableness test); and
- The requirement that a licensee enter into negotiations with a licence applicant.

Although there are existing regulations made by Icasa in terms of the Telecommunications Act (the regulations are technically still in force although the Act was repealed), they are effectively useless under for the negotiation of interconnection and facilities leasing agreements in terms of the EC Act.

Icasa did publish draft interconnection and facilities leasing regulations in Notices 898 and 899 in Government Gazette 30091 dated 24 July 2007. A second iteration of the interconnection and facilities leasing regulations in -

- Notice 1794 of 2007 in Government Gazette 30605 of 24 December 2007, Facilities Leasing Regulations; and
- Notice 1795 of 2007 in Government Gazette 30611 of 24 December 2007, Interconnection Regulations

No regulations in terms of the EC Act have, however, actually been made by Icasa.

Disputes

Reasonableness Disputes

Icasa will determine whether a request for interconnection or facilities leasing is reasonable if there is a dispute, within 14 days of notification of a dispute by the party requesting interconnection. The test to be used by Icasa is whether the request is technically and financially feasible, and will promote the efficient use of communications networks and services.

Unwillingness or Inability to Negotiate or Agree

In the case of an inability or unwillingness for the parties to agree on terms and conditions of interconnection or facilities leasing, either party may notify Icasa of a dispute. Also, if the parties fail to agree within three months of the date of a request, they are deemed unable or unwilling to agree.

If the parties are unable to agree and the dispute is referred to Icasa, Icasa may do one of three things:

- Impose the terms and conditions of interconnection or facilities leasing;
- Propose terms and conditions of interconnection or facilities leasing and instruct the parties to renegotiate; or
- Refer the matter to the Complaints and Compliance Committee (CCC).

The CCC must hear the matter and then make a recommendation to Icasa as to the appropriate action, which could include, if the licensee has repeatedly been found guilty of violations, suspension or revocation of its licence. Icasa must decide what action to take within 60 days of a recommendation by the CCC.

Implementation Disputes

Either party to an agreement that has been filed with Icasa may notify the CCC of a dispute in respect of the implementation of interconnection or the provision of facilities. The CCC must hear and decide the dispute on an expedited basis in accordance with regulations prescribed by Icasa.

Submission and Review of Agreements by Icasa

All interconnection and facilities leasing agreements must be submitted in writing to Icasa. Agreements become effective and enforceable only upon submission and remain so unless a court orders otherwise or Icasa decides inconsistency with its regulations. Icasa must review all agreements to determine whether an agreement is consistent with its regulations, except those agreements between parties that have been exempted from the obligation to interconnect. If an agreement is not consistent with the regulations, the parties will be required to renegotiate.

Icasa must provide copies of all interconnection agreements to anyone who requests them, except those between parties that have been exempted from the obligation to interconnect or provide facilities.

SUGGESTED AMENDMENTS TO THE EC ACT

Non-Discrimination

It is suggested that sections 37(6) and 43(7) should indicate that interconnection and facilities leasing must be non-discriminatory in all respects (including, but not limited to price) when compared to the licensee itself or its affiliates. As written, the provisions allow licensees to discriminate in their own favour except in respect of “technical standards and quality”. In the context of interconnection and facilities leasing, entities should not be able to discriminate in their own favour at all. Thus, section 37(6) and section 43(7) should be amended to state that agreement must not “in any way be

discriminatory to the comparable network services provided by such licensee to itself or an affiliate.”

Icasa’s Obligation to Regulate

It is suggested that sections 38(5), 44(5), 41, and 47 should be de-linked from chapter 10, which concerns competition matters. In other words, it should be clear that Icasa must regulate interconnection before, during and after any decisions made in terms of chapter 10 of the ECA with regard to who is dominant. Sections 38(5) and 44(5), and sections 41 and 47 should be amended to make Icasa’s obligation to regulate interconnection and facilities leasing unequivocal, even absent any decisions made in terms of chapter 10 of the EC Act.

Essential Facilities

It is suggested that section 43 of the EC Act should clearly distinguish facilities that must be provided upon request unless the request is unreasonable, and “essential facilities”, which must always be provided regardless of the provider’s opinion whether the request is reasonable. Therefore, it is suggested that section 43 be amended to include the following as section 43(8A).

Requests for essential facilities are deemed to be reasonable and all electronic communications network services licensees receiving such requests are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement within ten days of receiving the request, failing which the Authority will impose terms and conditions consistent with this Chapter within five days of receiving notification that the licensee has failed to conclude an agreement.

CONCLUSION

President Jacob Zuma in his first State of the Nation Address continued the theme of the elections - to try to make a better life for all of the people in South Africa. In speaking about ICT, the President mentioned digital migration and the roll-out of broadband, and emphasized the need ensure that costs are reduced.

One of the key factors in the cost of communications is the cost of interconnection and facilities leasing. Although the EC Act has been in force for three years, the regulator, Icasa, has failed to promulgate regulations to facilitate cost-based interconnection and

facilities leasing. It is widely understood that the lack of progress is a result of necessary amendments to the EC Act.

The amendments suggested herein do not require policy changes, and although they might be challenged by the incumbents, they will result in the more effective and efficient regulation of interconnection and facilities leasing by Icasa. The result surely will be a more competitive industry with the hopes of eventually reaching the goals of universal service - affordable access to all.

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